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Update on Cases Impacting Construction Defect Litigation

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Fresh Coat, Inc. v. K-2, Inc., 2010 Tex. LEXIS 610 at 11 (Tex. 2010)

In a recent decision, the Texas Supreme Court held that a subcontractor is a "seller," under Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a) and that the manufacturer owes the subcontractor a statutory indemnity duty. In *Fresh Coat, Inc. v. K-2*, Fresh Coat contracted with a homebuilder, Life Forms, Inc., to install exterior insulation and finishing systems, also called EIFS, in numerous homes. *Id.* at 1. The contract required Fresh Coat to indemnify Life Forms regardless of any fault on the part of Life Forms. *Id*. at 14. K-2 manufactured the EIFS synthetic stucco component. *Id*. at 1. With the aid of K-2's direction and guidance, Fresh Coat purchased and installed K-2's EIFS. *Id*. at 2. More than 90 homeowners sued K-2, Fresh Coat, and Life Forms claiming that the EIFS allowed water penetration that allowed structural damage to the walls, termite infestations, and mold. *Id.* When the homeowners reached settlements with all the defendants, Fresh Coat sought indemnification from K-2 for its settlement with the homeowners and also its settlement with Life Forms, even though there was an indemnity provision in its subcontract. *Id*.

Chapter 82 of the Texas Product Liability Act (TPLA) regulates a manufacturer's indemnity obligations extending from products liability claims. Tex. Civ. Prac. & Rem. Code § 82.001 (LEXIS 2010). Where the loss was not caused by the seller's actions, the statute imposes a duty on a manufacturer to indemnify a seller and hold the seller harmless of claims against the manufacturer's products. *Fresh Coat, Inc. v. K-2, Inc*., 2010 Tex. LEXIS 610 at 16. TPLA defines a "products liability action" as "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." Tex. Civ. Prac. & Rem. Code Ann. § 82.001(2). The court pointed out that the statute defines "seller" as "a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof." Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). Lastly, the court used Black's Law Dictionary to define "product" as "something that is distributed commercially for use or consumption and that is usually (1) tangible personal property; (2) the result of fabrication or processing; and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption." Black's Law Dictionary 1245 (8th ed. 2004).

The Texas Supreme Court concluded that EIFS is a "product" as that word is used in the text of Chapter 82 of the TPLA. *Fresh Coat, Inc. v. K-2, Inc*., 2010 Tex. LEXIS 610 at 6. The

Court rejected K-2's argument that products placed into the stream of commerce lose their status as products when they become integrated into real property even if they were "products" beforehand. *Id.* at 5. Instead the court pointed out that at least as to Fresh Coat's transaction with Life Forms; the EIFS was "used" as a result of commercial distribution thus placing it within the meaning intended under Chapter 82. *Id.* at 6.

The Court rejected K-2's argument that even if EIFS is a product, Fresh Coat is not a seller, but merely a service provider that installed a product. *Id.* at 10. Instead, the Court agreed with Fresh Coat's argument that it *did* provide EIFS installation services, but it was a product seller *and* a service provider, and since it did both it may be considered a product seller under Chapter 82. *Id.* at 11. The Court's conclusion was consistent with the Third Restatement of Torts, that Chapter 82's definition of "seller" does not exclude a seller who is also a service provider, nor does it require the seller to only sell the product. *Id.*

Moreover, the Texas Supreme Court held that Fresh Coat was entitled to repayment of monies it paid in settlement to Life Forms regardless of K-2's argument that there was an indemnity provision in Fresh Coat's subcontract. *Id.* at 14. Because Fresh Coat's settlement with Life Forms "arose out of a products liability action" from underlying homeowner claims against Life Forms that were settled, the action for damages allegedly caused by a defective product was appropriate. *Id.* at 15.

The Court further noted that section 82.002 does not provide K-2 with an exception from its indemnity obligation just because Fresh Coat is contractually liable to another. *Id.* Moreover, the Court observed that section 82.002(e) expressly provides that the manufacturer's duty to indemnify is in addition to any duty to indemnify created by law, contract or otherwise. *Id.* at 17. Further, the court held that "a manufacturer is not exempt from *any* loss for which a seller is independently liable." *Id.* at 20. The court reasoned that the statute limits this exception to indemnity losses "caused by the seller's tortious or otherwise culpable act or omission for which the seller is independently liable." *Id.*

In Re: Olshan Foundation Repair Co.
338 SW3d 883 (Tex. 2010)

In this case, the Texas Supreme Court addressed when the Federal Arbitration Act (FAA), and the Texas General Arbitration Act will apply to arbitration agreements. Olshan Foundation Repair Company is a national foundation repair contractor. In this consolidated appeal, multiple homeowner plaintiffs challenged whether their contracts with Olshan could compel them to arbitrate in light of language in the arbitration clauses. If the Texas Arbitration Act applied, the arbitration provisions would be void, because Section 171.002(a)(2) of the Texas Civil Practice & Remedies Code renders arbitration provisions unenforceable when the transactions were for less than $50,000 and do not include a signature from the consumer's attorney. It was undisputed that each of the contracts were for less than $50,000 and did not contain any signature from a

homeowner's counsel. In three of the contracts, the clause recited that arbitration would be "pursuant to the arbitration laws in your state."

With respect to those contracts, the Texas Supreme Court determined that the Federal Arbitration Act was a part of the law of the State of Texas. As such, the FAA preempted the Texas General Arbitration Act, and arbitration was required. With respect to the remaining appeal, the contract between Olshan and this homeowner required arbitration "pursuant to the Texas General Arbitration Act". Because this was an unambiguous choice of law, the Federal Arbitration Act did not preempt the Texas General Arbitration Act, and arbitration was not required.

Hixon v. Pedigo Services, Inc. 2011 Tex. LEXIS 3022 (Tex. App.—Houston [1st Dist] 2011)

In this case, the Plaintiff homeowners challenged the summary judgment granted to Pedigo Services, Inc., a roofing contractor. The home was constructed in 1995, with repairs being conducted in 1999. While the case has a tortured procedural history, this case is significant primarily for its analysis of statutes of limitations with respect to construction defects. On a previous appeal from a granted summary judgment notion, the Court of Appeals had previously determined that the causes of action for original construction had accrued in mid-1997. After remand and a renewed summary judgment being granted by the trial court, the Hixons contended in their second appeal that a new and independent breach of contract claim arose in 1999 based upon "faulty repairs and faulty assurances" of the repairs. The Court of Appeals rejected this attempt to, in essence "end run the Statute of Limitations". The Court wrote "the Hixons' breach of contract claim is not an independent claim seeking damages flowing from the Defendant's 1998-1999 repair efforts, but instead they complain about their failure to identify and remedy the original problems that the Hixons have known about since at least 1997. … by recasting the same facts into a new breach of contract claim for failure to identify and repair all the existing damage to the Hixons' home, the Hixons seek to circumvent this Court's prior holding that, by mid-1997, the Hixons knew a significant water leakage problems with the house such as they were on notice of any potential claims".

In other words, counsel for defendants should be vigilant in cases involving the limitations defense when Plaintiffs seek to toll or extend limitations by claiming that repairs of defects of original construction are "new breaches" or "new torts". This opinion reaffirms long-standing Texas precedent that repairs do not extend the limitations.